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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 653

A. H. STONE, CHAIRMAN STATE TAX COMMISSION,
Appellant,

vs.

RIECHMAN-CROSBY COMPANY

APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSISSIPPI

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS

S. RUFUS CREEKMORE,
Counsel for Appellee.



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STATUTES CITED

United States Code, Title 28:

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Section 1257(3) 1
Section 2103 1



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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 653

A. H. STONE, CHAIRMAN STATE TAX COMMISSION,
Appellant,

vs.

RIECHMAN-CROSBY COMPANY,
Appellee

STATEMENT OPPOSING JURISDICTION

Appellant undertakes to have this case reviewed by the Supreme Court of the United States under appeal procedure, although the statute cited as sustaining its jurisdiction, Judicial Code, Section 237 (b) (now United States Code, Title 28, Section 1257(3)), relates to review by certiorari rather than by appeal.

The decision of the Supreme Court of Mississippi was against the validity of the state statute drawn in question, and, therefore, cannot be reviewed on appeal, United States Code, Title 28, Section 1257 (2). But although the appeal is improvidently taken, we assume that this court will regard it as a petition for writ of certiorari (28 U. S. C. 2103) and in the exercise of its sound judicial discretion will either grant or deny the same.

I

The Judgment Rests upon an Adequate Non-Federal Ground and This Court, Therefore, Is Without Jurisdiction

The statute here involved was challenged by appellee as being violative of both the state and federal constitutions. The State Supreme Court upheld that contention, saying:

> "We, therefore, hold that the statute in question violates the due process clauses of both State and Federal Constitutions." (43 So. (2d) 191.)

The grounds underlying the decision of the Supreme Court of Mississippi are not left to surmise or conjecture, but are expressed in clear and unmistakable language. It was based on both federal and non-federal grounds, and the holding that the statute violated the due process clause of the State Constitution plainly presented a ground independent of any federal question in the case and sufficient in itself to sustain the judgment. Unquestionably the judgment in this case could have been rendered without deciding the federal question and since it alone was sufficient for a decision of the case, this court will not take jurisdiction.

Minnesota v. *National Tea Co.*, 309 U. S. 551, 84 L. Ed. 920;

Lynch v. *New York*, 293 U. S. 52, 79 L. Ed. 191;

Flournoy v. *Wiemer*, 321 U. S. 253, 88 L. Ed. 708;

Fox Film Corporation v. *Muller*, 296 U. S. 207, 80 L. Ed. 158;

New York v. *Central Savings Bank*, 306 U. S. 661, 83 L. Ed. 1058;

Southwestern Bell Tel. Co. v. *Oklahoma*, 303 U. S. 206, 82 L. Ed. 751;

Radio Station WOW v. *Johnson*, 326 U. S. 120, 89 L. Ed. 2092.

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II

The Construction Placed upon This Statute by the Supreme Court of Mississippi, and Its Application to the Facts Are Binding upon This Court.

In *Minnesota* v. *National Tea Company*, 309 U. S. 551, 84 L. Ed. 920, Mr. Justice Douglas, speaking for the court said:

"It is fundamental that state courts should be left free and unfettered by us in interpreting their state constitutions."

In *Quong Ham Wah Company* v. *Industrial Accident Comm.*, 255 U. S. 445, 65 L. Ed. 723, the court speaking through Chief Justice White said:

"It is elementary that this court is without authority to review and revise the construction affixed to a state statute as to a state matter by the court of last resort of the state."

And in *Federal Trading Co.* v. *Iowa*, 322 U. S. 335, 88 L. Ed. 1309, Mr. Justice Frankfurter said:

"The application by that court (Supreme Court of Iowa) of its local laws, and the facts on which it founded its judgment are of course controlling here."

To the same effect are:

Louisville Gas & Electric Co. v. *Coleman*, 277 U. S. 32, 72 L. Ed. 770;

Montana v. *Rice*, 204 U. S. 291, 51 L. Ed. 490;

Brinkerhoff-Faris Trust & Sav. Co. v. *Hill*, 281 U. S. 673, 74 L. Ed. 1107;

Nablett v. *Carpenter*, 305 U. S. 297, 83 L. Ed. 182;

Central Hanover Bank v. *Kelly*, 319 U. S. 94, 87 L. Ed. 1282;

Greenough v. *Tax Assessors*, 331 U. S. 486, 91 L. Ed. 1621.

In the present case the Supreme Court of the State of Mississippi, construing a local statute, as applied to facts undisputed, has held that appellee conducted no local activities in the State of Mississippi under the protection of its laws, and was not doing business in that state nor present there, so as to subject it either to the taxing power or the regulatory power of that state. Thus in its opinion on the first appeal the court said: (37 So. (2d) pp. 26, 27):

"The distinction here is that the Supreme Court of the State of Mississippi has never held that a nonresident is a retailer maintaining a place of business in this state, from the mere fact that it may have a soliciting agent operating within the state for the purpose of taking orders to be sent to his nonresident principal for acceptance or rejection and to be filled by shipments in interstate commerce where such nonresident seller maintains no office or other place of business here, and where such seller is engaged in no local activity under the protection of our laws, and where it is not qualified to do business within the state by appointing an agent for the service of process; that is to say, where it is not in fact doing business in this state in such a manner as to be present here. All of our decisions are directly to the contrary.

* * * * * * *

"The appellant in the case at bar was not doing business in this state and was not present here within the principles announced by this Court in the following cases: First National Bank *v.* Mississippi Cotton Seed Products Co., 171 Miss. 282, 157 So. 349; Item Co. *v.* Shipp, et al, 140 Miss. 699, 106 So. 437; Smith, et al. *v.* J. P. Seeburg Corporation, 129 Miss. 563; 6 So. (2d) 591; Stone *v.* General Contract Purchase Corporation, 193 Miss. 301, 7 So. 2d 806, 140 A.L.R. 1029; Stone *v.* General Electric Contracts Corporation, 193 Miss. 317, 7 So. 2d 811; A. H. Stone *v.* Memphis Natural Gas Co., 201 Miss. 670, 29 So. 2d 268, affirmed 335 U. S. 80, 68 S. Ct. 1475; and the very recent case of Craig *v.* Mills, Miss., 33 So. 2d 801. In the last four

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of the above cited cases, this court upheld the right to collect an excise tax on the sole ground that the nonresidents involved were engaged in local activities in this state and were enjoying rights here under our laws which were conferred and protected by the state."

And on the second appeal the court said: (43 So. (2d) pp. 189, 191)

"In our opinion in the prior appearance of this case here, we said (37 So. 2d 22, 23): 'The power of the state to require the nonresident seller to act as its tax collector in the premises is further challenged on the ground that such seller in the case at bar is not doing business in this state under the principles announced by any prior decision of this Court where the seller has no office, place of business or resident agent in this state, and has not qualified to do business here under our laws, and has not appointed a resident agent for the service of process, and is engaged in no local activity in Mississippi within the meaning of our previous decisions as to what constitutes doing business in this state; that is to say, the appellant questions the constitutional power and authority of the state to make a tax collector out of a nonresident seller over which it has no territorial jurisdiction, since the seller is not present here within the contemplation of our own legal jurisprudence and within the meaning of all the decisions of the Supreme Court of the United States, except that which was rendered in the case of General Trading Company doing business as Minneapolis Iron Store *v.* State Tax Commission of the State of Iowa, 322 U. S. 335, 64 S. Ct. 1028, 88 L. Ed. 1309, which is deemed not to be controlling in the instant case for the reasons to be hereinafter stated.'

"As we have pointed out above, we will not repeat our reasoning, since it may be readily found on reading our former opinion. Since we have construed our local laws and their application to the facts of this case, and since the Supreme Court of the United States declared in the Iowa case, 'The application by that Court of its local laws and the facts on which it founded its judgment are of course controlling here', we do not deem that case controlling on

us, for that reason; in addition to the other reasons set forth in our former opinion.

* * * * * * *

"In view of what we have said above, we therefore hold that the statute in question violates the due process clause of both State and Federal Constitutions."

III

The Federal Question Here Presented Has Been Foreclosed by Prior Decisions of This Court. It Is, Therefore, Unsubstantial, and This Court Will Decline Jurisdiction.

(a)

Since appellee was not doing business in the State of Mississippi within the meaning of the statute, as construed and applied by the Supreme Court of that State, the statute as applied to appellee is plainly violative of the due process clause of the Fourteenth Amendment to the Constitution of the United States.

Green v. *C. B. & Q. R. R. Co.*, 205 U. S. 530, 51 L. Ed. 916;

St. Louis Sw. Ry. Co. v. *Alexander*, 227 U. S. 218, 57 L. Ed. 486;

Phil. & R. R. Co. v. *McKibben*, 243 U. S. 264, 61 L. Ed. 710;

Peoples Tob. Co. v. *American Tob. Co.*, 246 U. S. 79, 62 L. Ed. 590;

International Shoe Co. v. *Washington*, 326 U. S. 310, 90 L. Ed. 95.

(b)

The Federal question presented by appellant has been foreclosed against him by the cases above cited. It is,

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therefore, so lacking in substantiality that this court will decline jurisdiction.

Utley v. *City of St. Petersburg*, 292 U. S. 106, 78 L. Ed. 1155;
Patterson v. *Stanolind Oil & Gas Co.*, 305 U. S. 376, 83 L. Ed. 231;
Seaboard Airline R. Co. v. *Watson*, 287 U. S. 86, 77 L. Ed. 180;
Wick v. *Chelare Elec. Co.*, 280 U. S. 108, 74 L. Ed. 212;
Lucht v. *King*, 260 U. S. 174, 67 L. Ed. 194;
Roe v. *Kansas*, 278 U. S. 191, 73 L. Ed. 259;
Miller & Lux v. *Sacramento*, 256 U. S. 129, 65 L. Ed. 859;
King v. *West Virginia*, 216 U. S. 92, 54 L. Ed. 396.

Conclusion

For the reasons herein set forth it is respectfully submitted that the appeal herein should be dismissed, and certiorari should be denied.

Respectfully submitted,

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